No. 87-523

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PAUL N. CARLIN,
Petitioner,

v.

JOHN R. McKEAN, Individually and as a member of the Board of Governors of the U.S. Postal Service, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. The Solicitor General in his brief describes the events surrounding petitioner's removal as "a regrettable episode in the history of the Postal Service" (Brief in Opposition at 5). But this understatement is like calling Secretary of the Interior Fall's acceptance of oilman Edward Doheny's bribe in the Teapot Dome scandal (*infra* at 7) "unfortunate." Substitute Postal Governor Voss for Secretary Fall and the magnitude of the postal scandal parallels Teapot Dome of an earlier day. The case at bar commands exercise of the power of this court to dispense

equity and justice. The victim of the fraud here is the former Postmaster General who stood in its way and for his efforts was rewarded by a fraudulently-induced removal.

What petitioner requests is a trial in the United States District Court for the District of Columbia, denied him until this moment, with the ultimate relief to be determined by the trial judge. As the court of appeals' panel which heard petitioner's plea for an injunction pending appeal stated: "Should the appellant succeed in his appeal, the court would have authority to order relief that would make him whole" (Order of August 12, 1986, CA 86-1811). What is required is the trial to which the defrauded and damaged former Postmaster General is clearly entitled.

2. Respondents assert (Brief in Opposition at 5) that the court of appeals' decision does not conflict with any decision of this Court or another court of appeals. This is manifestly incorrect.

The decision of the court of appeals denying petitioner's claims to judicial review is in conflict with this Court's decision in *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 729 (1832), and other decisions of this Court cited in the Petition at 10-11. *Arredondo* sets forth a universal principle that decisions committed to agency discretion are not reviewable *except* in two circumstances: (1) where the agency action was tainted by fraud, and (2) where the agency had no authority to act *or* the decision was not reached in the manner prescribed by the relevant statute. Since petitioner alleges that his removal was invalid under *both* these tests, the decision below conflicts with the *Arredondo* doctrine.

The court of appeals' decision is also in conflict with decisions of the Third Circuit concerning the right to judicial review. That circuit has held in three cases that

> Even when a court ascertains that a matter has been committed to agency discretion by law, it may entertain charges that . . . the agency's decision was occasioned by impermissible influences such as fraud or bribery, or that the decision violates a . . . statutory . . . command.

Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574, 580 (1979); *Kirby v. U.S. Government, Etc.,* 675 F.2d 60, 67 (1982); *Hondros v. United States Civil Service Com'n,* 720 F.2d 278, 293 (1983). These cases directly support petitioner's right to judicial review of claims that the Governors' decision was induced by fraud and did not comply with the command of 39 U.S.C. 205(c) (1) that a removal vote must be by "an absolute majority of the Governors in office."

The court of appeals' decision, in declining to review petitioners allegations as to the sufficiency and validity of the removal vote, also conflicts with decisions of the Third and Sixth Circuits holding invalid *in toto* collegial agency decisions which have been participated in by disqualified voters. The latter decisions are *Berkshire Employees Association v. N.L.R.B.,* 121 F.2d 235 (3d Cir. 1966), and *American Cyanamid Company v. F.T.C.,* 363 F.2d 757 (6th Cir. 1966).

3. Respondents beg the question when they argue that the Postal Reorganization Act vests complete discretion in the Postal Governors to appoint and remove Postmasters General. A fundamental error of the court of appeals' decision, echoed by the Solicitor General (Brief at 6-7), was seeking to divine the intent of Congress as to judicial review of removals of Postmasters General by looking only to the Postal Reorganization Act. Respondents slough off as the "*alleged* fraud exception" (Petition App. 9a, emphasis added) petitioner's claim to

judicial review based on *Arredondo* and other precedents of this Court.

The court of appeals' extensive discussion of legislative intent was unnecessary since there was no dispute here that the Act vests full discretion in the Postal Governors to appoint and remove a Postmaster General and does not contain a provision for judicial review of such decisions. However, Congress never enacted language stating that the Postmaster General could be fraudulently removed; that would have been contrary to the history of jurisprudence of this country.

Congress enacted the 1970 Postal Reorganization Act without effecting any change in the body of law applicable to fraud. Since repeals by implication will not be found unless an intent to repeal is clear and manifest, *Watt v. Alaska,* 451 U.S. 259, 267 (1981); *United States v. Borden Co.,* 308 U.S. 188, 198 (1939), this Court cannot conclude that by the 1970 postal legislation "Congress intended to create 'so great a breach in historic remedies and sanctions.'" *United States v. Borden Co., supra* at 198.

4. The best that the Solicitor General can say about *In re Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839), is that it is "relevant." The petition demonstrated (at 16-17) why *Hennen* is irrelevant, namely, it did not involve issues of fraud-tainted agency action.

5. Respondents argue that petitioner is not entitled to judicial review of his claim that his removal was invalid because two Governors who were disqualified from voting participated in the decision. Without these disqualified votes, there would not have been the "absolute majority" which 39 U.S.C. § 205(c)(1) requires. Respondents defend the court of appeals' declaration that a grant of judicial review would require the court to inquire into the "motivations" of the two disqualified Governors (Brief in Opposition at 8).

The issue is not the "motivations" of the disqualified Governors, but whether they were disqualified voters *as a matter of law.* This is precisely the type of question, even when a decision is committed to agency discretion, as to which the courts "still have the *obligation* . . . to scrutinize the action taken in order to determine whether specific . . . statutory, dictates . . .have been abridged." (Emphasis supplied.) *Local 2855, supra* at 583; *Kirby,* and *Hondros, supra.*

Not only was the vote unlawful because there were insufficient valid votes for the "absolute majority of Governors in office" required by the statute, but the *entire vote* was invalid because it was *tainted* by the participation of the disqualified voters. *American Cyanamid* and *Berkshire Employees Association* (cited in Petition at 19-20); also the opinion by Mr. Justice Brennan in *Pyatt v. Mayor and Council of Borough of Dunellen,* 9 N.J. 548, 89 A.2d 1 (1952), written when he was a justice of the Supreme Court of New Jersey (cited in Petition at 20).

6. The *Pyatt* case instructs about the doctrine of taint. There it was held that ordinances adopted by a borough council were infected with the taint of self-interest and were voidable if even one council member who voted was disqualified by conflict of interest. (89 A.2d at 4.) In *Pyatt,* Justice Brennan set forth language from another New Jersey case: "The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable." (*Id.* at 5). See also 1 Am Jur 2d, Administrative Law Section 68, at 864: "Participation in a determination by one disqualified member of a tribunal of three affects the action of the whole body."

7. Respondents take issue with petitioner's contention that Section 208(a) of the Criminal Code prohibited Voss from voting to remove petitioner from office. Section

208(a) prohibits an officer from participating in *any* matter, not merely judicial or quasi-judicial determinations, in which he has a financial interest. When Voss urged the other Governors to remove petitioner and when Voss himself voted for the removal of petitioner, Voss violated 18 U.S.C. 208(a) in corruptly engineering the removal of petitioner.

Respondents assert, however, that while Section 208(a) provides a basis for punishing any Governor shown to have violated that provision, Section 208(a)'s prohibition against conflicts of interest has no relevance to petitioner's right to obtain judicial review of the Governors' voting actions (Brief in Opposition at 8). However, Section 208(a) statutorily reinforces the common law rule prohibiting a person with an interest in a particular matter from being a decision-maker in respect of that matter. In simple terms, it was illegal for Voss to vote on petitioner's removal. The courts have the duty to determine whether the voting by the Postal Governors on petitioner's removal was tainted by this "impermissible influence." *Local 2855, Kirby, Hondros, American Cyanamid, Berkshire, supra.*

8. In their brief, respondents argue (at 5-6) that various actions, including criminal prosecutions and *ex post facto* adoption of a Code of Ethics for the Postal Governors, have adequately remedied the postal scandal. They resist, however, any kind of remedial action to set aside the unlawful decision, including declaratory relief, thus insisting that the fraud-procured decision of the Governors be allowed to stand. This is comparable to arguing that the Teapot Dome scandal would have been adequately dealt with merely by the prosecution and conviction for bribery of Secretary of the Interior Albert Fall (see *Fall v. United States*, 49 F.2d 506 (D.C. Cir. 1931)), without the civil action that was also taken to cancel the

Government petroleum contracts and leases which had been procured by the bribery and fraud (see *Pan American Petroleum and Transport Co. v. United States,* 273 U.S. 485 (1927)).

9. Respondents overreach by far when they assert that, under petitioner's theory, the courts would have the power to order the President to reinstate a person who showed that his removal from the Cabinet was tainted by fraud. It is commonly accepted that the President is entitled to have "his own people" in Cabinet positions, and that he should be free to remove them at his sole pleasure whenever his purposes would be served thereby. In this "political" area, practical as well as constitutional considerations dictate that the President be free from accountability to other branches of government for his decisions to remove political appointees.

Judicial review in the circumstances of this case, however, will not intrude upon Executive Branch prerogatives. The purpose of the Postal Reorganization Act was to remove the Postal Service from the political sphere. H.R. Rep. No. 91-1104, 91st Cong. 2d. Sess. at 1 (1970). No longer was the Postmaster General to be appointed and removed at the single pleasure of the President. By opting for a *collegial* appointing authority — the Governors — Congress imposed on those officers the established body of law governing collegial decision-making, with the judicial review attendant thereto (see discussion *supra* at 4-6). And by opting for a standard to govern removal from office — the "absolute majority" requirement — Congress rendered subject to judicial review removal actions in which the sufficiency of the vote is challenged.

Accordingly, to hold officials of an independent, non-political, agency accountable for their fraud-induced actions and invalid voting will not intrude upon Presidential

prerogatives or powers. The President's removal of officers requires no vote, since it does not involve participation by other persons. Therefore, this case does not affect the appointment and removal powers of the President. There is no legal or public policy reason why the Governors of the Postal Service, or similar officials of other independent agencies, should not be held to judicial accountability with respect to the matters which have been raised in this case.

10. Finally, respondents argument that the holding of the court below will have limited application because it turned on the court's reading of Section 202(c) and related provisions of the Postal Reorganization Act must be rejected. Contrary to what respondents say, the validity of petitioner's claim of fraud does not turn on interpretation of the statutory language of the Postal Reorganization Act. Rather, it turns on the jurisprudence this Court has propounded concerning fraud.

As previously noted, the decision of the court of appeals creates a conflict between the District of Columbia Circuit and the decisions of the Third Circuit in the *Local 2855, Kirby* and *Hondros* cases (*supra*) on the right to judicial review where agency actions results from non-compliance with a statutory command, such as the "absolute majority" requirement involved in the instant case. It also creates a conflict between the District of Columbia Circuit and the Third and Sixth Circuits as to the necessity of invalidating agency votes participated in by disqualified voters.

Contrary to what respondents state, resolution of these conflicts will not be limited in their effect merely to the removals of two Postal Service officers. Review by this court would affect other collegial agency decisions procured by fraud or tainted votes. This Court must reaffirm

that there are *no* circumstances under which fraud-induced agency actions and tainted agency votes will be permitted to stand.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 15, 1988